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IDAHO SHEEP [illegible]

Petitioner,

vs.

W. WILLARD WIRTZ, Secretary of Labor, United States Department of Labor,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE [illegible] CIRCUIT

BRIEF FOR THE PETITIONER

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1964

NO. 754

IDAHO SHEET METAL,

*Petitioner,*

vs.

W. WILLARD WIRTZ, Secretary of Labor, United States Department of Labor,

*Respondent.*

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**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

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## BRIEF FOR THE PETITIONER

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## OPINIONS BELOW

The opinion of the United States District Court in and for the District of daho, Southern Division, entered March 7, 1963, is not reported (R. 87). The opinion of the Court of Appeals for the Ninth Circuit, entered August 10, 1963, is reported as W. Willard Wirtz, v. Idaho Sheet Metal Works, Inc., 335 Fed. 2d 952. (98 through 109)

## JURISDICTION

The judgment of the United States Court of Appeals, Ninth Circuit, was entered on August 10, 1964 (R. 109). A timely petition for rehearing was denied on September 15, 1964, the day after its filing (R. 117). The Petition for a Writ of Certiorari was filed on December 11, 1964, and was granted on March 1, 1965. (R. 118, 119) The jurisdiction of this Court is invoked under 28 USCA 1254 (1).

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This Appeal involves the provisions of the Fair Labor Standards Act of 1938, C.676, 52 Stat. 1060, as amended by the Act of 1949, C.736, 63 Stat. 910, 29 USCA 201, et sec.: Section 13 (a) (2) Section 13 (a) (4). These provisions are reprinted in Appendix A, infra.

## QUESTION PRESENTED

Is the Petitioner's business operation a retail establishment and entitled to the exemption as such, under Section 13 (a) of the Fair Labor Standards Act?

## STATEMENT OF THE CASE

These are two actions brought by the Secretary of Labor under the Fair Labor Standards Act. (R. 1,

5). Section 17 of the Act authorizes the District Courts of the United States to restrain violations of the Act, while Section 16 (c) authorizes the Secretary of Labor to bring suit on behalf of the employees to recover amounts due under Sections 6 and 7, Minimum Wage and Over-time Provisions of the Act. Accordingly, Cause No. 1887 was brought by the Secretary, pursuant to Section 17 to enjoin alleged further violations by Petitioners of the Act's overtime provisions, while cause No. 1888 was instituted under Section 16 (c), to recover unpaid overtime compensation on behalf of one of the Defendant's employees, William B. Coombs. (record 1, 5). The two actions were consolidated for trial, at the conclusion of which the District Court held Petitioner's employees were not within the coverage of the Act, and, further, that Petitioner's enterprise was a retail establishment and therefor exempt (record 11, 87, 88, 89, 90, 91). Appeal was taken to the United State Court of Appeals, Ninth Circuit.

The Court of Appeals for the Ninth Circuit reversed the judgment of the District Court and remanded the case to the District Court to enter judgment on behalf of the Respondents. (R.109).

On March 1, 1965, this Court entered its Order permitting Certiorari directed to the question as to whether or not the employer's shop is a retail establishment and entitled to the exemption as such,

under Section 13 (a) of the Fair Labor Standards Act. (R. 118, 119)

The Petitioner in this case operates a custom sheet metal shop in a small agricultural town, Burley, Idaho. The shop was built in 1957 and was established for the purpose of serving local community's needs in the custom, fabricating and making of sheet metal or tin items to be sold or installed for the general public, including merchants, farmers, individuals and in some instances, manufacturers (R. 50, 51, 52, 54, 55, 57, 58, 59, 63) The products were all made and sold at a retail price computed by adding a profit, cost of labor and materials (R. 55, 56) The shop was, and is, an enlarged projection of the old-time tin shop and is described by the manufacturing salesmen in the industry as a retail outlet (R. 58, 59, 60, 61, 64, 65, 52)

Some time after the shop was established, seasonal manufacturers of frozen food products located in the community, and intermittently at irregular intervals, usually during the "down" periods, used the facilities of the Defendant for the installation of items such as air ducts, air conditioning equipment, storage tanks, elevator buckets, endless conveyor belts, conductors and chutes. (R. 57, 16, 14, 12)

The shop and building is equipped with a counter, work benches, and racks for display and storage of products, such as sheet metal, tubing, tin and other objects (R. 52, 63, 64, 65).

## ARGUMENT

### I.

### THE RECORD IN THIS CASE SHOWS THAT THE PETITIONER MEETS ALL OF THE STATUTORY TESTS FOR BEING A RETAIL SERVICE ESTABLISHMENT.

Section 13 (a) (2) and (4 of the Fair Labor Standards Act requires that the exemption be afforded industries who meet the following tests:

(1) At least 50% of the establishment's annual dollar volume of sales must be made within the State in which the establishment is located.

(2) At least 75% of the establishment's annual dollar volume of sales must be to purchasers who do not buy for resale.

(3) At least 75% of the establishment's annual dollar volume of sales must be recognized in the particular industry as retail sales.

(4) The establishment must be recognized as a retail establishment in the particular industry.

(5) The goods which the establishment makes or processes must be made or processed at the establishment which sells them.

(6) More than 85% of the establishment's annual dollar volume of sales of goods which it makes or processes must be made within the state within

which the establishment is located. (Appendix A, infra)

Respondent conceded at the pre-trial that Petitioner meets requirements (1), (2), (5) and (6). (R. 24)

The undisputed testimony in this case indicates that not only 75% of the establishment's annual dollar volume of sales are recognized as retail sales, but that all sales are recognized as such. (R. 60, 61, 63, 64, 55, 56) The testimony shows that the method of determining the price for any custom-built item, or, for that matter, any item is determined on the basis of a retail price, Certainly, if it is not for resale as stipulated (R. 24), and it is computed on the basis of a retail price, all sales of Petitioner are retail sales.

The undisputed evidence in this case also indicates that requirement (4) has been met, in that the establishment is considered and recognized as a retail establishment within the custom sheet metal industry. (R. 59, 60, 61, 64, 65, 66)

## II.

## PETITIONER'S BUSINESS ESTABLISHMENT OR A CUSTOM SHEET METAL SHOP IS NOT OUTSIDE THE TRADITIONAL RETAIL CONCEPT.

This Court in *Mitchell v. Kentucky Finance Co.*, 359 US 290, interpreted the 1949 amendments to the

Fair Labor Standards Act in such a way as to impose an additional requirement, namely, that the industry under consideration be considered retail under traditional concepts. This "traditional concept" was determined by whether or not the particular business under consideration had ever in the past been classified by the Courts or the Administrator as non-retail in character.

> "We find nothing in the debates or reports which suggests that Congress intended by the amendment to broaden the field of business enterprise to which the exemption would apply. Rather, it was time and again made plain that the amendment was intended to change the prior law only by making it possible for business enterprises otherwise eligible under existing concepts to achieve exemption even though more than 25% of their sales were to other than private individuals for personal consumption, provided those sales were not for resale and are recognized in the field or industry involved as retail."

359 US 294

Before the Court may turn to the statutory requirements of 13 (a) (2) and (4), this additional test must be met concerning the industry's prior status as retail or non-retail. The holding in the *Kentucky Finance Case*, supra, imposes two addi-

tional issues which must be decided on the basis of the record and applicable case law. The first is, what is the Petitioner's business and what are its characteristics and, secondly, once the business has been characterized and defined has it been awarded a retail or non-retail status.

The transcript in the District Court and the witnesses testifying clearly established that the industry under consideration is called the "custom sheet metal industry." (R. 58, 59) The custom sheet metal industry serves the public in an area not covered by the hardware store which is undisputedly retail and the manufacturer of sheet metal products which manufactures according to set forms and on a production line basis. This industry serves that portion of the general public wanting one specific item, large or small, made according to their specifications and order. (R. 58, 59, 60, 61)

Since the record shows the name and characteristics of the industry under consideration, namely the custom sheet metal industry, it must be determined on the basis of the *Kentucky Finance case*, supra, whether or not this industry has been categorized as retail or non-retail in character. Throughout the trial and briefing in this case, the Government has consistently taken the position that based upon the interpretative bulletins which recognize "machine shops" "industrial blacksmiths" "establishments engaged in reconditioning industrial tools," and "establishments engaged in resistance welding,"

as being non-retail in nature that the custom sheet metal industry is also non-retail in nature. However, the record does not indicate at any place where the custom sheet metal industry is in any way analogous to these broad industrial definitions. The Government wholly fails to show any analogy whatsoever between the custom sheet metal industry and "establishments engaged in resistance welding." In the absence of any showing as to why the custom sheet metal industry is identical to the industries above named, the test of the *Kentucky Finance case*, supra, on pre-determined retail status has been met.

In *Wirtz v. Modern Trashmoval, Inc.*, 323 Fed. 2d 451 (4th Circuit - 1963) the Fourth Circuit Court ruled that a corporation engaged exclusively in the collection and disposal of garbage, rubbish, debris and industrial waste, was entitled to the exemptions under 13 (a) (2) and (4) of the Fair Labor Standards Act. In arriving at this conclusion, the Fourth Circuit Court was faced with a problem similar to the situation presented here.

The Fourth Circuit notes on page 465 of its decision that the rulings of the Administrator have not classified the trash removal industry as ineligible for lack of a "retail concept." The Administrator in that case urged, as they have in this case, that the Defendant's activities are closely analogous to those other types of establishments considered as ineligible for exemption, in cases and administrative regula-

tions noted in 29 CFR Par. 779.317.

However, the Fourth Circuit discarded this method of determining whether or not an establishment is retail in nature and determined the question solely on the basis of the record before it and traditional concepts.

In the *Trashmoval case*, supra, the court stated: "We agree that close and persuasive comparisons existed in *Goldberg v. Sorvas*, supra, especially where the service offered had utility only to business men, and we note that the employees there involved, on occasion, crossed state lines to render the service. However, in none of the types of establishments called to our attention do we find such similar characteristics as would compel us to hold that an establishment offering and performing trash removal services in the manner shown by this record is beyond the 'retail concept.'

"In determining whether or not a business activity is a 'retail or service establishment' within the meaning of the section 13 (a) (2) exemption, we think the most satisfactory approach is to examine the facts of record as to the nature and conduct of its business in the light of general criteria developed under the Act since its enactment in 1938." Page 465-466.

In other words, if there has been no prior determination by the Courts or Administrator on the retail or non-retail status of the business presently before the Court, the retail status is to be decided not by haphazard attempts to fit the business under consideration into some other wholly unrelated business enterprise, but rather by looking at the facts in the record; its business characteristics, and based upon these factors to determine whether or not it does, in effect, constitute a retail establishment. The Fourth Circuit looked to whether or not numerous sales were made by the establishment. Whether or not the services are offered to the general public in a limited geographical area at uniform rates with no discounts similar to wholesale sales. Whether or not there is any requirement of minimum service from each customer, or any quantity discounts. Whether or not there is any requirement that the customer have status as a manufacturer, retailer or other commercial entity before service will be rendered to them. It was also pointed out that the trash removal business constitutes the "end of the stream of distribution" type of operation. 323 Fed. 2d 465, 466. These tests were approved and applied in *Wirtz* v. *English, dba English Oil Service*. 339 Fed. 2d, 691 (10 Cir. 1965)

The similarities between the custom sheet metal industry and what the Fourth Circuit felt was important in determining whether or not an estab-

lishment has a "traditional retail concept," are striking. The record in this case establishes very clearly that the service is offered to the general public in a limited geographical area at uniform rates, with no discounts. (R. 55, 56, 57). The record indicates that the sales of the Petitioner herein are on a standard basis to everyone with no quantity discounts. The record also clearly establishes that sales are made to the general public, with no requirement as to its customer being a manufacturer, retailer or other commercial entity (R. 51, 52, 54, 56, 57).

In addition, the Pre-Trial Order stipulated that 75% of the Defendant's annual dollar volume of sales of goods or services, or both, are not for resale. (R. 24). This clearly places the Petitioner's business at the "end of the stream of distribution." The record also establishes beyond question that for the specialized service rendered by the Petitioner, namely, custom sheet metal work, all their sales and services are to the ultimate consumer of the same and at retail. (R. 60, 54).

## III.

## THE NINTH CIRCUIT COURT OF APPEALS APPLIED THE "BUSINESS USE TEST" IN CLASSIFYING PETITIONER'S BUSINESS AS BEING TRADITIONALLY NON-RETAIL.

The Ninth Circuit in the case presently before this Court and cited as *Wirtz v. Idaho Sheet Metal Works, Inc.*, 335 Fed. 2d 952 (Ninth Circuit 1964) employed the following language in determining that the Petitioner's business was outside the "retail concept."

"The trial court here decided that Defendant's business was within the retail concept in the following manner: It noted that in *Roland*, supra, the Supreme Court had held that concern outside the retail concept. There the court said (326 US p. 666, 66 S.Ct. p. 417):

" '(T)he exemption reaches employees of only such retail or service establishments as are comparable to the local merchant, corner grocer or filling station operator who sells to or serves ultimate consumers who are at the end of, or beyond, that "flow of goods in commerce," which it is the purpose of the Act to reach.' *It seems obvious that if the tests applied in the Roland case are applied here, we must conclude that the defendant is not within the retail exemption.* (Emphasis ours).

"The trial court disregarded the Roland test stating that the retail concept described in Roland 'was repudiated by the 1949 amendment to the Act,' citing *Mitchell v. Kentucky Finance Co.*, supra. But the latter case shows that the 1949 amendment served no such purpose. The

*Roland* case had indicated approval of a rule to the effect that sales of goods or service for 'business use' were not retail. The *Kentucky Finance* case shows, as does the legislative history of the 1949 amendment, that the sole purpose of that amendment was to do away with this 'business use' test.' * * *"

*Wirtz v. Idaho Sheet Metal Works, Inc.*, 335 Fed. 2d 956, at 957.

The only test used in the *Roland case*, supra, which was overruled by the 1949 amendment, was whether or not the sales or services were to a person for his own personal use or were to be used by a commercial or business user. If the latter, they were not a retail sales, if the former, they were considered a retail sale. (326 US 667)

In addition, on page 957 of the Ninth Circuit decision, they attempted to pigeonhole the custom sheet metal industry with such totally unrelated businesses as machine shops and foundries, industrial blacksmiths and establishments engaged in sharpening and reconditioning industrial tools. It is respectfully submitted that the reasoning of the Fourth Circuit should be applied, and unless the specific industry under consideration here, the custom sheet metal industry, has not had a prior determination as to its status, we must refer to the record and from the record determine whether there

is a retail concept. Since there has been no prior administrative ruling or court decision classifying the custom sheet metal industry, and since the evidence shows sales to the general public at the "end of distribution," it is respectfully submitted that the Petitioner's business is not outside the retail concept.

Petitioners urge that the holding of the *Kentucky Finance case*, supra, does not require the courts, in all instances, to decide the retail status of an industry based upon whether or not it has business characteristics in some way similar to an industry already determined. If the Administrator is permitted to classify business enterprises seeking retail exemption as non-retail on the basis of loose analogy every industry seeking exemption will have its status determined preliminarily and on the basis of other industries remotely similar to it rather than on the provisions of 13 (a) (2) (4) of the F.L.S.A. It would appear obvious that this was not the intent of Congress in amending section 13 (a) in 1949.

It is respectfully urged that the *Kentucky Finance case*, supra, requires only that the courts look to whether or not the *particular* business under consideration has been classified as retail or non-retail. If it has not and it has retail characteristics as the petitioner's business has in this case, then the requirements of 13 (a) (2) and (4) should be applied. This procedure if followed in this case, as it was in

the *English* and *Trashmoval* cases, supra, will best reflect the intent of Congress and without question establish the petitioner business as retail.

## CONCLUSION

For the foregoing reasons, the judgment of the Ninth Circuit Court of Appeals should be reversed, and the case remanded to the United States District Court for the District of Idaho, with directions to grant Petitioner's motion to dismiss.

Respectfully submitted,

T. H. EBERLE
711½ Bannock Street
Boise, Idaho

*Counsel for Petitioner*

WESTON & WESTON
711½ Bannock Street
Boise, Idaho

VESTAL P. COFFIN
1903 North 9th
Boise, Idaho
*Of Counsel*

# APPENDIX A

The relevant portions of Section 13 read as follows:

"SEC. 13(a). The provisions of sections 6 and 7 [the Act's minimum wage and overtime requirements] shall not apply with respect to * * *

"(2) any employee employed by any retail or service establishment, more than 50 per centum of which establishment's annual dollar volume of sales of goods or services is made within the State in which the establishment is located * * *. A 'retail or service establishment' shall mean an establishment 75 per centum of whose annual dollar volume of sales of goods or services (or of both) is not for resale, and is recognized as retail sales or services in the particular industry; or * * *

"(4) any employee employed by an establishment which qualifies as an exempt retail establishment under clause (2) of this subsection and is recognized as a retail establishment in the particular industry notwithstanding that such establishment makes or processes at the retail establishment the goods that it sells: *Provided*, That more than 85 per centum of such establishment's annual dollar volume of sales of goods so made or processed is made within the State in which the establishment is located; * * *."